

## BOOK REVIEW

SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970. By John D'Emilio. Chicago: University of Chicago Press, 1983. Pp. x., 257. Price \$20.00.

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Since 1970, when Kate Millett's book *Sexual Politics* was first published,<sup>1</sup> the linkage of the words "sexual" and "politics" has probably ceased to shock. Now John D'Emilio has linked "sexual politics" with "sexual communities."<sup>2</sup> His linkage may still shock some, but if his thesis is correct, gay politics are now far enough "out of the closet" to be a phenomenon with which the political mainstream must reckon.

The subtitle "The Making of a Homosexual Minority in the United States, 1940-1970" guides us toward D'Emilio's thesis. D'Emilio documents the creation of the homosexual minority from its days of unawareness to 1981, when gay rights became a "minority" plank in the Democratic Party National Platform.

To the legal mind, the word "minority" conjures up civil rights, affirmative action, equal protection, and due process. The focus, initially, was on the "quantitative"—small groups overshadowed by the majority. The concept derived from our constitutional foreparents who sought to ensure minority rights against majoritarian power. The older view stressed the protection of "factions"; however, the "factions" were based on belief systems rather than on race, nationality, and the like. The concept of a minority changed when women, clearly a quantitative majority, were qualitatively recognized as a "minority." Other groups, such as the handicapped and the aged have also come to be recognized as minorities. Perhaps the newest of the recognized minorities is gay men and women.

In the developing law of equal protection, a comparable classification has arisen, namely the "suspect" class. While the Supreme Court

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<sup>1</sup> K. MILLETT, *SEXUAL POLITICS* (1970).

<sup>2</sup> J. D'EMILIO, *SEXUAL POLITICS, SEXUAL COMMUNITIES: THE MAKING OF A HOMOSEXUAL MINORITY IN THE UNITED STATES, 1940-1970* (1983).

has not yet included women and certain other groups in this classification, the criteria for a suspect class provide, for many, a clear vision of those minority groups deserving of protection from the majoritarian political process. The indicia include "political powerlessness"<sup>3</sup> and "a long and unfortunate history"<sup>4</sup> of purposeful, unequal treatment. The group must have "immutable characteristic[s]"<sup>5</sup> which make it impossible or highly unlikely for its members to escape from the class.<sup>6</sup> Today the argument that gay people should be treated as a suspect class is taken almost as seriously by lawyers (if not by judges) as is the argument that women should be so treated.<sup>7</sup> Neither women nor gay people have been particularly successful in persuading courts on this point. Yet, D'Emilio believes that the ability to make a plausible argument and defend it represents an advance, and the emergence of gay Americans as a conscious community and political minority is his story.

My approach to this story will be as follows. First, I will present a summary, highlighting what I take to be the most important developments. Then, I will consider what light D'Emilio's history of the emergence of gay consciousness throws on the kinds of litigation in which gay men and women have been involved over the last few decades.

Before 1940, according to D'Emilio, no one would have conceptualized gay people as a minority and for us to pretend now that a homosexual minority existed at that time would be fallacious if not silly. The hundreds of thousands of men and women whom today we would call "gay" lived isolated and invisible lives. In the United States, there was virtually no public discourse on the subject. It was indeed a crime "not fit to be named."<sup>8</sup> Men and women who recognized and/or acted on their same sex eroticism generally knew few persons like themselves and had no access to the little information available on the subject. Current activists often ridicule the classic 1928 lesbian novel, *The Well of Loneliness*,<sup>9</sup> for the negative self-images of its characters, but, in its day, the book performed the function of informing isolated lesbians that there indeed were other women like themselves. Homosexual persons in the United States before World War II faced a triple whammy—they were sinful, sick, and criminal. Every state had laws that criminalized

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<sup>3</sup> *Plyler v. Doe*, 457 U.S. 202, 216 n.14 (1982) (quoting *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)).

<sup>4</sup> *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973).

<sup>5</sup> *Id.* at 686.

<sup>6</sup> See, e.g., *Weber v. Aetna Casualty & Sur. Co.*, 406 U.S. 164 (1972).

<sup>7</sup> See Chaitin & Lefcourt, *Is Gay Suspect?*, 8 LINCOLN L. REV. 24 (1973).

<sup>8</sup> *Honselman v. People*, 168 Ill. 172, 174-5, 48 N.E. 304, 305 (1897), quoted in J. D'EMILIO, *supra* note 2, at 19.

<sup>9</sup> R. HALL, *THE WELL OF LONELINESS* (1928).

homosexual behavior (and much of heterosexual behavior).<sup>10</sup>

D'Emilio marks World War II as a turning point in gay history.<sup>11</sup> The severe dislocations caused by war gave many men and women their first opportunity for anonymity. In addition, membership in the armed forces gave large numbers of people prolonged contact with their own sex and opportunities to explore their sexual nature away from their hometowns. Finally, the Army's need for combat and support personnel was such that it put aside traditional homophobia and ignored much of what went on among the troops. Many gay persons discovered, for the first time, large numbers of other gay men and women. Many gay people would never again accept the old life of isolation.

D'Emilio credits two other phenomena of the late 1940's and early 1950's with raising gay consciousness. First, Alfred Kinsey published his studies of male and female sexual behavior in the United States.<sup>12</sup> "Of all Kinsey's statistics none challenged conventional wisdom as much as the data on homosexuality."<sup>13</sup> When Kinsey pointed out that "[p]ersons with homosexual histories are to be found in every age group, in every social level, in every conceivable occupation, in cities and on farms, and in the most remote areas of the country,"<sup>14</sup> he challenged many myths. Viewing the issue clinically, Kinsey refused to label homosexual behavior as abnormal, unnatural or neurotic. Rather, he concluded, according to D'Emilio, that it represented an inherent physiological capacity. Kinsey viewed society's treatment of homosexual persons as socially destructive. This radically different viewpoint, D'Emilio believes, had a beneficial impact on gay people. Such information gave isolated homosexual persons a sense of belonging to a group, a group numbering, Kinsey estimated, in the hundreds of thousands.<sup>15</sup>

The second development which, according to D'Emilio, planted the seeds of a gay consciousness was the emergence of gay bars. During World War II and the late 1940's, gay bars became numerous, bringing the sexuality of individual gay people into the public arena.

While the 1940's were the seed bed of collective consciousness, the

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<sup>10</sup> See W. BARNETT, *SEXUAL FREEDOM AND THE CONSTITUTION* (1973); Note, *The Constitutionality of Laws Forbidding Private Homosexual Conduct*, 72 MICH. L. REV. 1613 (1974).

<sup>11</sup> J. D'EMILIO, *supra* note 2, at 23-39.

<sup>12</sup> A. KINSEY, W. POMEROY & C. MARTIN, *SEXUAL BEHAVIOR IN THE HUMAN MALE* (1948) [hereinafter cited as KINSEY, SBHM]; A. KINSEY, W. POMEROY, C. MARTIN & P. GEBHARD, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953) [hereinafter cited as KINSEY, SBHF].

<sup>13</sup> J. D'EMILIO, *supra* note 2, at 35.

<sup>14</sup> *Id.* at 36 (quoting KINSEY, SBHM, *supra* note 12, at 627).

<sup>15</sup> *Id.* at 35-37.

1950's almost destroyed the newly emerging consciousness. The 1950's brought us Joe McCarthy, the Cold War, and the hunt for the "comp-symp-pervert."<sup>16</sup> I learned this phrase as the teenage daughter of a federal government employee. D'Emilio's reconstruction of this era reminds me of my father's fears and rekindles old sensations. D'Emilio describes the systematized oppression of gay people in the 1950's, emphasizing the severe discrimination in public and government employment. The reason given for refusing to hire and for firing homosexual federal employees was their "character,"<sup>17</sup> for they allegedly lacked the emotional stability of "normal" people.<sup>18</sup> Furthermore, "sexual perverts" imperiled national security.<sup>19</sup> "Immature, unstable, and morally enfeebled by the gratification of their perverted desires, homosexuals lacked the character to resist the blandishments of [a] spy."<sup>20</sup> The military, no longer in need of cannonfodder, returned to its old homophobia and renewed its search for "queers." The military gave dishonorable discharges to hundreds of loyal men and women, leaving them stigmatized for life.<sup>21</sup> Private industry went on witch hunts as well, applying to its employees the same security provisions the government applied to federal workers. According to D'Emilio, the official legitimization of oppression encouraged local police forces to systematically harass gay bars, beaches, and restaurants.<sup>22</sup>

D'Emilio sees the 1950's as exerting contradictory influences on gay people. On the one hand, by repeatedly condemning homosexuality, conservatives broke the silence surrounding the topic. "[T]he resources available to lesbians and homosexuals for attaching a meaning to otherwise dimly understood feelings expanded noticeably."<sup>23</sup> Thus the attacks "hastened the articulation of a homosexual identity."<sup>24</sup> On the other hand, these oppressive years burdened homosexual persons with a "corrosive self-image" as "perverts, psychopaths, [and] deviates."<sup>25</sup>

D'Emilio suggests that before the 1950's, gay men and women had no particular self-image as gay people because of their isolation, but that during the 1950's many gay men and women gained a sense of group consciousness while at the same time "internaliz[ing] the negative

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<sup>16</sup> Translation: Communist-sympathizer-pervert.

<sup>17</sup> J. D'EMILIO, *supra* note 2, at 42.

<sup>18</sup> *Id.* (quoting S. Doc. No. 241, 81st Cong., 2d Sess. 4. (1950)).

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* at 43 (quoting S. Doc. No. 241, 81st Cong., 2d Sess. 4-6 (1950)).

<sup>21</sup> *Id.* at 44-46.

<sup>22</sup> *Id.* at 49-51.

<sup>23</sup> *Id.* at 52.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at 53.

descriptions and . . . [learning to] embody the stereotypes."<sup>26</sup> The pressure to remain invisible and isolated was extreme in the 1950's. Surprisingly, in 1951, a small group of homosexual men actually dared to found the Mattachine Society.<sup>27</sup> The group's initial goals included the development of a strong group consciousness free of negative attitudes. From the Mattachine Society's original discussions, says D'Emilio, a cogent analysis emerged of "homosexuals as an oppressed cultural minority."<sup>28</sup> The bravery of these hardy pioneers was demonstrated by their "incorporation" as a not-for-profit educational organization in 1952.<sup>29</sup> A comparable women's group called the Daughters of Bilitis was founded in 1955.<sup>30</sup> The founders of the Mattachine Society acquired the knowledge, theories, and organizational skills needed to establish the society through their early careers as Communist Party activists. Despite subsequent disillusionment with communism—based in part on the Party's homophobia—the founders learned from Marxist theory the importance of a group's consciousness of oppression.

The radical approach of the Mattachine founders, however, did not last through the decade. The pull of the 1950's was too strong. More conservative groups, groups that wanted to rely on non-homosexual professionals to educate the public, took over both Mattachine and Daughters of Bilitis. D'Emilio describes these conservative groups as lacking the self-confidence to define and describe their own experience, and as accepting society's evaluation of gay people. Rather than taking social or political action as an oppressed minority, they sought to "be assimilated as constructive, valuable, and responsible citizens."<sup>31</sup> D'Emilio describes the Daughters of Bilitis and the Mattachine Society in the 1950's as pursuing a "quest for legitimacy."<sup>32</sup> He points out, however, that "the movement took upon itself an impossible burden—appearing respectable to a society that defined homosexuality as beyond respectability."<sup>33</sup>

The 1960's were a time when many groups sought their "civil rights." D'Emilio's picture suggests that the gay movement lagged about ten years behind the other major civil rights movements. As Blacks and war protesters took to the streets, gay people were just be-

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<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 58. For more information on the Mattachine Society, see J. KATZ, *GAY AMERICAN HISTORY* 406-20 (1976).

<sup>28</sup> J. D'EMILIO, *supra* note 2, at 65.

<sup>29</sup> *Id.* at 73.

<sup>30</sup> *Id.* at 102.

<sup>31</sup> *Id.* at 84.

<sup>32</sup> *Id.* at 118.

<sup>33</sup> *Id.* at 125.

ginning to view themselves as an oppressed minority. The groundwork laid by the Mattachine Society and Daughters of Bilitis in the 1950's made possible the achievements of subsequent decades. According to D'Emilio, the anticensorship decisions handed down by the Supreme Court in the early 1960's allowed the quantity of discourse on homosexuality to increase dramatically.<sup>34</sup> The subject was no longer taboo. Simultaneously, the prestigious American Law Institute (ALI) endorsed the Model Penal Code, which decriminalized adult, private consensual sexual behavior.<sup>35</sup> Only two states adopted the law in the 1960's,<sup>36</sup> but that was a beginning.

The 1960's also saw Dr. Evelyn Hooker begin her study of homosexuality.<sup>37</sup> She was virtually the only mental health professional to study homosexual men who were neither institutionalized nor in therapy. As lawyers and psychologists began to break with past models, new gay activist leaders emerged, drawing their energy from the other activists of the 1960's. These new activists, probably best personified by Dr. Franklin Kameny,<sup>38</sup> represented a decisive break from the accommodationist spirit of the 1950's. Such militants explicitly rejected the medical model of homosexuality, asserted a right to equality, and insisted that gay people deserved recognition as a persecuted minority. These militants were laying the groundwork for a new, positive gay identity. As D'Emilio says, the new gay activists "solidly ground[ed] themselves in righteous anger over perceived injustice."<sup>39</sup>

D'Emilio points to a communication gap between the new leadership and its purported constituency. The leadership tended to devalue the "bar culture," failing to perceive it as an important facet in building a gay consciousness. Yet, in the late 1950's and early 1960's, the first real gay victories came in California when owners of gay bars, tired of harassment and extortion, banded together in the Tavern Guild to fight back rather than passively acquiesce. Slowly, in the courts, the

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<sup>34</sup> *Id.* at 134.

<sup>35</sup> MODEL PENAL CODE § 213.2 (Proposed Official Draft 1962). See MODEL PENAL CODE § 207.5 note on status of section (Tent. Draft No. 4, 1955); Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669 (1963).

<sup>36</sup> Conn. Penal Code, Pub. Act No. 828, §§ 66-91, 1969 Conn. Pub. Acts 1554, 1579-85 (codified as amended at CONN. GEN. STAT. ANN. §§ 53a-64 to 53a-80 (West 1972 & Supp. 1983)); Criminal Code of 1961, §§ 11-2, 11-3, 1961 Ill. Laws 1983, 2006 (codified as amended at ILL. ANN. STAT. ch. 38, §§ 11-2, 11-3 (Smith-Hurd 1979 & Supp. 1983)). See also J. D'EMILIO, *supra* note 2, at 146.

<sup>37</sup> Hooker, *Male Homosexuals and Their "Worlds,"* in SEXUAL INVERSION: THE MULTIPLE ROOTS OF HOMOSEXUALITY (J. Marmor ed. 1965).

<sup>38</sup> Dr. Franklin Kameny, well-known as a founder of the Mattachine Society, has remained active in the gay civil rights movement, often participating in litigation as a consultant.

<sup>39</sup> J. D'EMILIO, *supra* note 2, at 174.

gay population won the right to socialize in bars.

D'Emilio pinpoints the end of 1965 as the point in time when the "homophile" movement was "ready to escape the isolation and marginality of the past and to enter into the mainstream of social and political reform."<sup>40</sup> He notes that fifteen gay groups were known to exist in 1966, while by 1969 the number had grown to fifty.<sup>41</sup> In New York and Florida, gay people won, in part through the courts, the right to be served liquor,<sup>42</sup> and in 1968 the New York City Civil Service Commission began to hire gays when prodded by a lawsuit.<sup>43</sup> The federal courts in the late 1960's began to see more appeals, which suggests to D'Emilio that gay partisans believed that a legal appeal might be won. The American Civil Liberties Union (ACLU) in 1967 became publicly involved in the fight for gay rights,<sup>44</sup> and in the same year the National Institute of Mental Health appointed Evelyn Hooker to chair a committee charged with investigating the subject of homosexuality.<sup>45</sup>

The 1960's showed real gains in the courts and in public discourse, but no constituency, no masses, really mobilized. While militant advocates for the civil rights of other minorities shifted their emphasis to community organizing and the ideology of power politics, the gay movement was still in the courts.

The events of June 27, 1969, finally moved the gay rights movement into the streets with other mass movements. When gay people first fought back against police harassment in the Stonewall riots in New York City,<sup>46</sup> gay pride and gay power moved closer to becoming a reality. Less than a year later, gay activists invaded the American Medical Association convention and disrupted the American Psychiatric Association convention. One year after Stonewall, between 5,000 and 10,000 men and women marched to commemorate the riot.<sup>47</sup> By the 1983 commemoration, the marchers numbered 250,000 in San Fran-

<sup>40</sup> *Id.* at 196.

<sup>41</sup> *Id.* at 199.

<sup>42</sup> See *Kerma Restaurant Corp. v. State Liquor Auth.*, 21 N.Y.2d 111, 233 N.E.2d 833, 286 N.Y.S.2d 822 (1967); *Inman v. City of Miami*, 197 So. 2d 50 (Fla. Dist. Ct. App. 1967), *cert. denied*, 389 U.S. 1048 (1968).

<sup>43</sup> See *Brass v. Hoberman*, 295 F. Supp. 358 (S.D.N.Y. 1968) (remanding for trial on the merits a challenge to the New York City Civil Service Commission's policy of declaring homosexuals ineligible for employment as caseworkers).

<sup>44</sup> J. D'EMILIO, *supra* note 2, at 200.

<sup>45</sup> *Id.* at 217. See NATIONAL INST. OF MENTAL HEALTH, FINAL REPORT OF THE TASK FORCE ON HOMOSEXUALITY (1969).

<sup>46</sup> The name "Stonewall" derives from the name of the bar at which the New York gay community finally fought back against police harassment. See N.Y. Times, June 29, 1969, at 33, col. 1; *id.*, June 30, 1969, at 22, col. 1; *id.*, July 3, 1969, at 19, col. 6.

<sup>47</sup> See N.Y. Times, June 29, 1970, at 1, col. 6.

cisco, 150,000 in New York City, even 1,800 in Columbus, Ohio!<sup>48</sup>

In the 1970's,<sup>49</sup> gay groups became so numerous that one could only guess that there must be thousands. The American Psychiatric Association removed homosexuality from its list of mental disorders in 1973,<sup>50</sup> and twenty more states repealed criminal laws against homosexual behavior.<sup>51</sup>

D'Emilio sees the late 1970's and early 1980's as evincing a significant shift in the self-definition of gay men and women. Gay people have formed churches, health clinics, counseling services, social centers, professional associations, sports leagues, record companies, travel agencies, resorts, newspapers, magazines, literary journals, and the like.<sup>52</sup>

The conclusion D'Emilio draws from this history is that today's gay populace, leaders and followers alike, owes a great deal to the energy and vision of the early leaders. The consciousness of an individual as a homosexual person, as a member of an oppressed group, had to be built before a mass movement could develop. More important, D'Emilio has shown how and to what extent gay people have won, at the price of much pain, the right to be treated as whole persons rather than solely as erotic beings. The movement has enabled many "to break out of the ideological prison that confined them to a sexual self-definition. . . . Homosexuality and lesbianism have become less of a sexual category and more of a human identity."<sup>53</sup>

The *New York Times Book Review*, in a short piece, characterized D'Emilio's book as "a sympathetic history rendered in a dispassionate voice."<sup>54</sup> It is that and more. The book is just plain interesting. It is also well written. The language is clear, the ideas flow smoothly, and the organization is supportive. Moreover, as a retired political scientist, I found this story of the creation of a viable political force fascinating. (In this connection, interested readers might also wish to look at Altman's *The Homosexualization of America*,<sup>55</sup> which ties economic and

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<sup>48</sup> See N.Y. Times, June 27, 1983, at B3, col. 5.

<sup>49</sup> D'Emilio's history ends with the Stonewall riot, although he makes some remarks about more recent events in his final chapter.

<sup>50</sup> AMERICAN PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS 131 (2d ed. 1968). Syntonic homosexuality was removed as a disorder, leaving only dystonic homosexuality to require treatment. In general terms, syntonic homosexual persons are those who feel comfortable with their sexual identities and with their environments. Dystonic homosexual persons are those who have negative feelings about their sexual identities as a result of internalizing negative societal attitudes toward homosexuality.

<sup>51</sup> See *infra* note 127.

<sup>52</sup> J. D'EMILIO, *supra* note 2, at 238-39.

<sup>53</sup> *Id.* at 248.

<sup>54</sup> N.Y. Times, May 22, 1983, § 7 (Book Review), at 18, col. 1.

<sup>55</sup> D. ALTMAN, *THE HOMOSEXUALIZATION OF AMERICA* (1982).



social factors into the creation of a homosexual minority.)

As a lawyer and legal scholar, I was curious to see what relation D'Emilio's structuring of gay political history bore to the history of gay litigation. D'Emilio attributes definite features to the 1950's, 1960's, and 1970's. I wanted to see if gay legal history fell into the same patterns. Using my own research,<sup>56</sup> I found that patterns emerge in gay civil litigation which closely resemble the patterns of D'Emilio's political history.

For example, among civil cases brought before 1950, I discovered only six dealing with homosexual persons. Three of these six are divorce cases.<sup>57</sup> None of the three mention "homosexuality" per se, they refer instead to "unnatural love,"<sup>58</sup> "unnatural practices,"<sup>59</sup> "sodomy,"<sup>60</sup> and "pederasty."<sup>61</sup> There is no judicial recognition of the husband as a homosexual person, only references to his "improper" sexual behavior. This same judicial attitude is reflected in a 1951 New York case in which the court refused to find an act of sodomy to be an act of adultery, saying that adultery requires sexual intercourse and therefore does not include acts of carnal knowledge.<sup>62</sup> In the only pre-1950 custody/visitation case,<sup>63</sup> homosexuality per se is again not mentioned, and only by close reading and careful inference can one deduce the true

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<sup>56</sup> See Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HASTINGS L.J. 799 (1979) [hereinafter cited as *Our Straight-Laced Judges*]; Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311 (1980-81). The first of these articles provides a comprehensive picture of the legal position of homosexual persons in the United States, categorizing cases by time period and emphasis. It provides, for the legal scholar, the practicing attorney, and the interested layperson, a basis from which to begin analysis. The second article updates its predecessor through 1980, and a third article is in progress which will consider cases through 1983. Authority for many of the assertions to be found in the balance of this paper should be sought in these articles.

One final point should be noted. There are a number of methodological problems involved in researching legal decisions dealing with homosexuality. The first and most obvious is the variety of legal subdisciplines which are involved. For years, most indexes never had a single topic listing for homosexuality. The author maintains files which attempt to include every published civil decision in which homosexuality is an issue. Further, many unpublished decisions have been obtained by the relentless efforts of tireless research assistants who extract hints from nonlegal sources and obtain such cases from attorneys or from the courts.

<sup>57</sup> *Currie v. Currie*, 120 Fla. 28, 162 So. 152 (1935); *Crutcher v. Crutcher*, 86 Miss. 231, 38 So. 337 (1905); *Poler v. Poler*, 32 Wash. 400, 73 P. 372 (1903).

<sup>58</sup> *Currie v. Currie*, 120 Fla. 28, 34, 162 So. 152, 154 (1935).

<sup>59</sup> *Crutcher v. Crutcher*, 86 Miss. 231, 235, 38 So. 337, 337 (1905).

<sup>60</sup> *Id.* *Poler v. Poler*, 32 Wash. 400, 402, 73 P. 372, 372-73 (1903).

<sup>61</sup> *Crutcher v. Crutcher*, 86 Miss. 231, 235, 38 So. 337, 337 (1905).

<sup>62</sup> *Cohen v. Cohen*, 200 Misc. 19, 20, 103 N.Y.S.2d 426, 427-28 (N.Y. Sup. Ct. 1951).

<sup>63</sup> *Holland v. Holland*, 49 Ohio Law Abstracts 237, 75 N.E.2d 489 (Ohio Ct. App. 1947).

issue.

In custody cases, judicial refusal to deal openly with homosexuality persisted as late as 1973 in *Spence v. Durham*.<sup>64</sup> Only by reading the dissent in *Spence* can one tell that the mother had been accused of lesbianism.<sup>65</sup> The court's attitude supports D'Emilio's theory that society was deliberately silent on the issue. This silence made gay individuals feel isolated and alone. Each individual felt as if he or she was the only homosexual person in existence.

The two remaining civil cases in the pre-1950 category involve immigration matters. As was typical of that era, the men involved were not labeled "homosexuals"; the word appears nowhere in either case.<sup>66</sup>

I found twenty-four civil cases from the years 1950-59, which in D'Emilio's chronology encompass the founding of the Mattachine Society, the McCarthy era, and the accommodationist period of gay politics. These cases represent a 400 percent increase over the number of cases brought before 1950, but twenty-four is still, in absolute terms, very few. The single largest group of cases involved liquor licensing, nine cases in all. This statistic corresponds to D'Emilio's observation that gay bars came into existence in the late 1940's, but not until the late 1960's did gay people win the right to have liquor served to them in such establishments. Particularly during the 1950's, police harassed gay men and women by attempting to deprive gay bars of their liquor licenses. The New York State line of cases began in 1952 with *Lynch's Builders Restaurant, Inc. v. O'Connell*,<sup>67</sup> in which the licensee lost his license because he knowingly allowed homosexual activities on the premises. The New York courts continued to revoke licenses until 1967 when, in *Kerma Restaurant Corporation v. State Liquor Authority*,<sup>68</sup> a New York court found that "the mere congregation of homosexuals, where there is no breach of the peace, does not make the premises disorderly."<sup>69</sup>

Similar cases can be found in California. Initially, gay bars were protected by a 1951 California Supreme Court case.<sup>70</sup> Later, however, courts circumvented that case, relying upon a different section of the California code to uphold a number of license revocations in the early

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<sup>64</sup> 283 N.C. 671, 198 S.E.2d 537, *cert. denied*, 415 U.S. 918 (1973).

<sup>65</sup> *Id.* at 698, 198 S.E.2d at 552 (dissenting opinion).

<sup>66</sup> *In re J*, 2 I. & N. Dec. 533 (1946); *In re Z*, 2 I. & N. Dec. 316 (1945).

<sup>67</sup> 303 N.Y. 408, 409, 103 N.E.2d 531 (1952).

<sup>68</sup> 21 N.Y.2d 111, 233 N.E.2d 833, 286 N.Y.S.2d 822 (1967).

<sup>69</sup> *Id.* at 114, 233 N.E.2d at 834, 286 N.Y.S.2d at 823 (quoting the lower court opinion, 27 A.D.2d 918, 278 N.Y.S.2d 951, 952 (1967)).

<sup>70</sup> *Stoumen v. Reilly*, 37 Cal. 2d 713, 234 P.2d 969 (1951).

1960's (1961-63).<sup>71</sup> The California liquor licensing cases disappear in 1963, very close to the date when, according to D'Emilio, the gay bar owners formed the Tavern Guild to fight the police and the Liquor Control Board.<sup>72</sup> Pennsylvania, Louisiana, and Florida all had liquor license cases in the 1950's and early 1960's.<sup>73</sup> Not until 1967, when the New Jersey Supreme Court acted in *One Eleven Wines and Liquors, Inc. v. Division of Alcoholic Beverage Control*,<sup>74</sup> was the issue clearly resolved. The New Jersey court relied on *Robinson v. California*<sup>75</sup> to hold that the homosexual status of the bar's patrons did not alone justify refusing to serve them liquor. Liquor licensing cases, which number nine between 1950-59 and fifteen between 1960-69, drop to two between 1970-79, and disappear altogether after that.

The last California liquor licensing case<sup>76</sup> is illustrative of how far the gay movement had come into the civil rights mainstream. In that case, the bar owner cited deprivation of due process and equal protection, and claimed his patrons' freedom of association rights were "chilled."<sup>77</sup> This 1973 case was dismissed on *res judicata* grounds<sup>78</sup> so the constitutional issues were never decided. The last New York case<sup>79</sup> found, in 1975, that "[t]here [was] no evidence that the gay dancing here was indecent . . . ."<sup>80</sup> Quite a change! The persons were called "gay" rather than, as in the 1950's cases, perverts, and gay dancing was acceptable and not per se indecent!

The 1950's also produced six divorce cases involving homosexual persons, three of which attributed homosexuality to women.<sup>81</sup> In only one of those cases was the term "homosexuality" actually used.<sup>82</sup> Interestingly, in the case that discussed homosexuality explicitly, homosexu-

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<sup>71</sup> See, e.g., *Stoumen v. Munro*, 219 Cal. App. 2d 302, 33 Cal. Rptr. 305 (1963) (interpreting CAL. BUS. & PROF. CODE §§ 25601, 24200(b) (West 1964)).

<sup>72</sup> J. D'EMILIO, *supra* note 2, at 189.

<sup>73</sup> See *Our Straight-Laced Judges*, *supra* note 56, at 920-22.

<sup>74</sup> 50 N.J. 329, 235 A.2d 12 (1967).

<sup>75</sup> 370 U.S. 660 (1962) (holding that a statute that made the status of being a drug addict a felony inflicted cruel and unusual punishment).

<sup>76</sup> *Francisco Enter. Int'l v. Kirby*, 482 F.2d 481 (9th Cir. 1973), *cert. denied*, 415 U.S. 916 (1974).

<sup>77</sup> *Id.* at 484.

<sup>78</sup> *Id.* at 485.

<sup>79</sup> *Chipman Assocs., Inc. v. New York State Liquor Auth.*, 47 A.D.2d 585, 363 N.Y.S.2d 162 (1975).

<sup>80</sup> *Id.* at 585, 363 N.Y.S.2d at 164.

<sup>81</sup> *Gilmore v. Gilmore*, 45 Cal. 2d 142, 287 P.2d 769 (1955); *H. v. H.*, 59 N.J. Super. 227, 157 A.2d 721 (1959); *Santos v. Santos*, 80 R.I. 5, 90 A.2d 771 (1952).

<sup>82</sup> *H. v. H.*, 59 N.J. Super. 227, 230, 157 A.2d 721, 723. One case, *A.B. v. C.D.*, 74 Pa. D. & C. 83 (1950) is interesting because the wife's behavior was labeled "sodomy." But see *Thompson v. Aldredge*, 187 Ga. 467, 200 S.E. 799 (1939) (crime of sodomy as defined by Georgia statute cannot be accomplished by two women).

ality itself was not found to be a ground for divorce; rather, the homosexual behavior was found to constitute extreme cruelty to the other spouse and was thus a proper basis for divorce.<sup>83</sup> Nonetheless, the court referred to the "natural revulsion"<sup>84</sup> arising from finding one's spouse to be gay.

In the same period, 1950-59, gay parent custody cases numbered only two. The decade saw four published military cases and two cases dealing with professional licenses. The military cases in the 1950's were not administrative discharges reviewed by civilian courts, as in the 1960's and 1970's; rather, the cases in the 1950's were court martials under the Uniform Code of Military Justice (UCMJ). The saddest case, indicating the extent of military zealotry against homosexual persons, is *United States v. Hooper*.<sup>85</sup> In that case, an admiral who had served with distinction in World War II and had been decorated was convicted, ten years after his retirement, of homosexual conduct. He suffered total forfeiture of his retirement pay. Of two professional license cases, one involved a doctor whose license revocation was reversed on procedural grounds<sup>86</sup> and the other a lawyer who was disbarred by the state of Florida.<sup>87</sup> The latter opinion, in keeping with the silence of the era, does not mention homosexuality but only alludes to an act contrary to "good morals and in violation of the laws of the state."<sup>88</sup>

In contrast to the age of accommodationist gay politics, which produced only twenty-four reported civil cases, the 1960's produced fifty-two. The largest single category of 1960's cases has been discussed already, namely the fifteen cases which effectively gave gay people the right to be served liquor. Divorce cases dropped to one,<sup>89</sup> custody cases remained at two.<sup>90</sup> The sole professional licensing case involved the denial of a pilot's license because of homosexuality.<sup>91</sup>

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<sup>83</sup> *H. v. H.*, 59 N.J. Super. 227, 236-39, 157 A.2d 721, 726-28.

<sup>84</sup> *Id.* at 236, 157 A.2d at 726; *see also* *Santos v. Santos*, 80 R.I. 5, 9, 90 A.2d 771, 773 (homosexuality is "wholly repugnant to and destructive of the marriage covenant").

<sup>85</sup> 9 C.M.A. 637, 26 C.M.R. 417 (1958).

<sup>86</sup> *Lorenz v. Board of Med. Examiners*, 46 Cal. 2d 684, 298 P.2d 537 (1956).

<sup>87</sup> *State ex rel. Floridia Bar v. Kimball*, 96 So. 2d 825 (Fla. 1957). Much later, in 1974, Kimball was admitted to practice in New York. He then attacked the constitutionality of his disbarment. In *Kimball v. Florida Bar*, 465 F. Supp. 925 (S.D. Fla. 1979), the court dismissed his collateral attack noting that he had not petitioned the Supreme Court for certiorari after the 1957 decision. However, in *Florida Bar in re Kimball*, 425 So. 2d 531 (Fla. 1982), Kimball was reinstated by the Florida Bar, subject to his passing the Florida Bar exam.

<sup>88</sup> 96 So. 2d at 825.

<sup>89</sup> *Feuti v. Feuti*, 92 R.I. 219, 167 A.2d 757 (1961).

<sup>90</sup> *Nadler v. Superior Court*, 255 Cal. App. 2d 523, 63 Cal. Rptr. 352 (1967); *Commonwealth v. Cortes*, 210 Pa. Super. 515, 234 A.2d 47 (1967).

<sup>91</sup> *Doe v. Department of Transp.*, 412 F.2d 674 (8th Cir. 1969).

Immigration cases jumped from one in the 1950-59 period, to twelve in the 1960-69 period. Only one was a victory, in that the alien involved was not deported.<sup>92</sup> This victory came about because the United States appellate courts held that the term "psychopathic personality" was too vague to constitutionally warn homosexual persons of what behavior might lead to their exclusion. The victory was, however, short lived, because in 1967 the United States Supreme Court held in *Boutilier v. Immigration and Naturalization Service* that Congress meant to exclude homosexuals by the phrase "psychopathic personality," and that such an exclusion was constitutionally permissible.<sup>93</sup>

The amazing part, from an historical perspective, was that, in most cases, unsuccessful gay litigants did not just quietly acquiesce; rather, they appealed. As D'Emilio indicates, gay litigants seemed increasingly to believe that favorable decisions were possible. The only bright note in the immigration decisions is found in the words of Douglas's dissent in *Boutilier*. He broke the silence and acknowledged the Kinsey statistics in a Supreme Court decision; he also implied that homosexual persons were capable, functioning human beings. Douglas pointed out facts that few had chosen to deal with regarding the policy of total exclusion of homosexuals:

It is common knowledge that in this century homosexuals have risen high in our own public service—both in Congress and in the Executive Branch—and have served with distinction. It is therefore not credible that Congress wanted to deport everyone and anyone who was a sexual deviate, no matter how blameless his social conduct had been nor how creative his work nor how valuable his contribution to society.<sup>94</sup>

Douglas's words put a radically different view of homosexual persons on the record of the highest court in the land.

Any review of the homophobic results of immigration cases of this

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<sup>92</sup> *Fleuti v. Rosenberg*, 302 F.2d 652 (9th Cir. 1962). Another case, *Lavoie v. Immigration & Naturalization Serv.*, 360 F.2d 27 (9th Cir. 1966), *vacated and remanded*, 387 U.S. 572, *modified and remanded*, 389 U.S. 908 (1967), *order aff'd*, 418 F.2d 732 (1970), *cert. denied*, 400 U.S. 854 (1970), constituted only a temporary victory: in 1966, the 9th Circuit held, following *Fleuti*, that the term "psychopathic personality" was unconstitutionally vague and enjoined Lavoie's deportation, but in 1967 the Supreme Court vacated *Lavoie* in light of the ruling in *Boutilier v. Immigration & Naturalization Serv.*, 363 F.2d 488 (2d Cir. 1966), *aff'd*, 387 U.S. 118 (1967), that Congress intended that the term "psychopathic personality" include homosexuality.

<sup>93</sup> *Boutilier v. Immigration & Naturalization Serv.*, 363 F.2d 488 (2d Cir. 1966), *aff'd*, 387 U.S. 118 (1967).

<sup>94</sup> 387 U.S. at 129 (Douglas, J., dissenting).

period must be imbued with pathos. In *Babouris v. Esperdy*,<sup>95</sup> a man was deported after thirty-nine years in the United States and, in *Campos v. Immigration and Naturalization Service*,<sup>96</sup> another man was deported after fourteen years. In *In re Schmidt*,<sup>97</sup> the court ruled that a lesbian alien did not possess the requisite "good moral character" to be naturalized despite findings that all of her homosexual behavior had taken place in the privacy of her home with adult partners, that she had been regularly and successfully employed for fourteen years, that she had never been convicted of a crime, and that her reputation, except for her sexual preference, was beyond reproach.

The most interesting change in the cases during the 1960's corresponds precisely to the developments described in D'Emilio's history. D'Emilio reports that a group of East Coast militants broke away from the accommodationist theories of the Mattachine Society and the Daughters of Bilitis in the early 1960's. One of the most prominent of these militants was Dr. Franklin Kameny. Kameny, fired from the United States government service, embarked on what was often a one-man crusade to change the position of homosexual persons in federal employment. Based in Washington, Kameny assisted gay litigants in numerous cases.

Of civil cases brought between 1960 and 1969, twelve dealt with homosexual persons fighting discharge from various positions of public employment. Nine of the cases involved federal employees, one municipal employees; two dealt with teachers. The federal employment cases climax with *Norton v. Macy*<sup>98</sup> in 1969, in which the District of Columbia Circuit Court of Appeals said that homosexual persons cannot be fired or excluded from federal employment, unless there is a "rational nexus" between their homosexuality and their job performance.<sup>99</sup> In this landmark decision, Kameny's type of militancy paid off. In the years that followed, the inability of the United States Civil Service Commission to show a rational nexus between people's sexual preference and their job performance led eventually to a change in United States Civil Service Regulations.<sup>100</sup> The one municipal employment

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<sup>95</sup> 269 F.2d 621 (2d Cir. 1959), *cert. denied*, 362 U.S. 913 (1960).

<sup>96</sup> 402 F.2d 758 (9th Cir. 1968).

<sup>97</sup> 56 Misc. 2d 456, 289 N.Y.S.2d 89 (1968).

<sup>98</sup> 417 F.2d 1161 (D.C. Cir. 1969).

<sup>99</sup> Although the precise language in *Norton* is "rational basis," 417 F.2d at 1164, the case is known as the first case to use the rational nexus test. *See generally* Note, *Federal Employment of Homosexuals: Narrowing the Efficiency Standard*, 19 CATH. U.L. REV. 267 (1969).

<sup>100</sup> 5 C.F.R. § 731.202(b) (1983).

case, *Brass v. Hoberman*,<sup>101</sup> was brought in New York City and was responsible, according to D'Emilio, for pushing the New York City Civil Service Commission into "quietly" hiring gay people.<sup>102</sup> The two social workers who brought the case claimed a denial of due process; the New York City Civil Service Commission settled with them.

These cases indicate to some extent a changing climate in the courts with regard to public employment, but the two most amazing cases of the 1960's are the teacher cases, both from California. With respect to homosexuality, no area of employment is more controversial than teaching. In *Sarac v. State Board of Education*,<sup>103</sup> a California court held that an obvious rational connection existed between Sarac's homosexual behavior and the revocation of his teaching license. Two years later, however, the California Supreme Court decided *Morrison v. State Board of Education*,<sup>104</sup> still a landmark case in this area. Morrison's teaching license was revoked on the grounds of immoral or unprofessional conduct after the State Board of Education found that he had had a noncriminal sexual encounter with another teacher. The California Supreme Court held, however, that only conduct directly establishing "unfitness to teach" could be grounds for revocation of a teaching license. The test California established for teachers in *Morrison* resembles the rational nexus test developed in *Norton* for federal employees in demanding that the employer prove that the employee's homosexuality bears directly on his job performance. Thus, by the end of the 1960's, New York, California, and the federal government were on their way to discovering civil rights for gay people. That litigation, centered in New York, California, and Washington, is consistent with the patterns of gay culture described by D'Emilio. Especially in San Francisco and New York City, events and people came together to produce strong, active, and visible gay communities. Such communities soon produced leaders more interested in gay pride and gay activism than in passive acculturation.

Last but not least, the 1960's produced nine military cases. Unlike the 1950's cases, which were all court martials, seven of the 1960's cases were judicial reviews of administrative action taken by the military against homosexual personnel. Thus, gay persons in the armed services had begun to fight back in civilian courts against the services' homophobia and to challenge the stigma of discharge. It is fascinating to note how many gay people seemed to want the right to remain in the

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<sup>101</sup> 295 F. Supp. 358 (S.D.N.Y. 1968).

<sup>102</sup> J. D'EMILIO, *supra* note 2, at 208.

<sup>103</sup> 249 Cal. App. 2d 58, 57 Cal. Rptr. 69 (1967).

<sup>104</sup> 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969).

service. The courts, however, uniformly upheld the military services. Court after court considered the stigma caused by dishonorable discharges, recognized that such stigma did the homosexual soldier or sailor "irreparable harm,"<sup>105</sup> and yet—ironically—held for the military against the homosexual service members. Although unsuccessful, these challenges demonstrated the remarkable bravery and stubbornness of gay litigants in face of insuperable odds.

As the 1960's drew to a close, the Stonewall riot was about to occur and increasing numbers of gay people were in the courts, fighting as never before, but losing nonetheless. As D'Emilio points out, however, the subject of homosexuality was no longer taboo. There was some positive public discourse, there were leaders who advocated an aggressive stand, and there were glimmers of possible victories.

The cases of 1970-79 reveal, as could be expected from D'Emilio's history, a broad spectrum of homosexual persons taking on the establishment in old and new areas alike. Cases in the civil area jump from 52 to 126.

The largest single type of case between 1970 and 1979 was the gay parent's child custody case. I have found forty of these cases, of which eighteen reached the appellate level. A jump from two cases to forty is obviously significant. When one considers the nature of domestic relations courts in the United States, however, the number of appellate level cases becomes even more remarkable. Custody standards used in state courts are vague, and judicial discretion is broad. Child custody cases, more so than other civil cases, are fact-intensive and thus, difficult to appeal because they seldom present appealable legal issues. The existence of eighteen cases in which a homosexual parent fought the custody decision to the appellate level, then, reveals a phenomenal growth in litigation. I think that this growth is a direct reflection of gay pride created by, among other things, the Stonewall riot. In most of the cases, the gay parent is "out of the closet," and demands parental rights on an equal footing with the non-gay parent. Looking at the custody cases between 1970 and 1979, one finds that of the forty cases, twenty-five were, ultimately, victories for the gay parent, while only fifteen were losses. Gay people entered the courts more often as they began to believe that winning was possible.<sup>106</sup>

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<sup>105</sup> See, e.g., *Crawford v. Davis*, 249 F. Supp. 943 (E.D. Pa.), *cert. denied*, 383 U.S. 921 (1966).

<sup>106</sup> Actually, most of the "wins" occurred between 1975 and 1979. It should also be noted that the retention of custody is not always a complete victory. See, e.g., *DiStefano v. DiStefano*, 60 A.D.2d 976, 401 N.Y.S.2d 636 (1978) (mother awarded full visitation rights on condition that mother's life partner not be present during visitations).



In the 1970's, a new category of cases appeared which illustrates how much gay activism had become a part of the traditional civil rights milieu. Between 1970 and 1979, there were eight cases in which students sued public state universities that refused to recognize gay student organizations. The cases reached three federal circuit courts of appeals,<sup>107</sup> and one state supreme court.<sup>108</sup> The results were clear. Gay students may not be denied their first amendment rights of speech and association. These and other decisions guarantee that public discourse about homosexuality will not be forced back into the closet of the 1950's. Moreover, such decisions mean that in the 1980's, unlike the 1950's, gay individuals will not be isolated but will instead have the opportunity to belong to a community. If D'Emilio's thesis is correct, these decisions have contributed directly to the strengthening of the homosexual minority.

If the university cases illustrate gay rights in the mainstream of the American civil rights struggle, the "marriage" cases which first occurred in the 1970's show that gay rights are still far from the societal mainstream. Between 1970 and 1979, there were five cases in which gay men and women attempted to legitimize their relationship through traditional marriage. In all the cases, the right of persons of the same sex to marry was emphatically denied.<sup>109</sup> Whether these cases should be classified as instances of gay persons attempting to accommodate themselves to conventional morality, or in some other manner, is difficult to say. In at least one case, the purpose of the attempted marriage was clearly to claim certain economic benefits accruing to married persons.<sup>110</sup>

A second group of 1970's cases, four in number, involved gay individuals seeking to be recognized as a family, in one form or another, without using the marriage route. The cases involved cohabitor's contracts à la *Marvin v. Marvin*,<sup>111</sup> constructive trusts,<sup>112</sup> and foster parenting.<sup>113</sup> Such cases are evidence of creative lawyering, of sympathetic attorneys attempting to use the traditional legal system to create

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<sup>107</sup> *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977); *Gay Alliance of Students v. Matthews*, 544 F.2d 162 (4th Cir. 1976); *Gay Lib v. University of Mo.*, 558 F.2d 848 (8th Cir. 1977), *cert. denied*, 434 U.S. 1080, *reh'g denied*, 435 U.S. 981 (1978).

<sup>108</sup> *University of N.H. v. April*, 115 N.H. 576, 347 A.2d 446 (1975).

<sup>109</sup> *See, e.g., Jones v. Hallahan*, 501 S.W.2d 588 (Ky. 1973).

<sup>110</sup> *McConnell v. Nooner*, 547 F.2d 54 (8th Cir. 1976).

<sup>111</sup> 18 Cal. 3d 660, 134 Cal. Rptr. 815, 557 P.2d 106 (1976) (involving rights of heterosexual cohabitators).

<sup>112</sup> *Weekes v. Gay*, 243 Ga. 784, 256 S.E.2d 901 (1979).

<sup>113</sup> *In re Davis*, 1 FAM. L. REP. (BNA) 2845 (Wash. Super. Ct., Clark Cty., Oct. 10, 1975).

for their gay clients some of the benefits of belonging to a family. Every recognition of the validity of gay relationships that comes through these side-door approaches further weaves gay rights into our common law.

Another example of gay organizations moving into the societal mainstream are the incorporation/tax-exempt status cases. In the 1970's, five such cases arose when gay organizations went public by seeking incorporation in their respective states or claiming tax-exempt status from the Internal Revenue Service (IRS) or both. Courts divided on the issue. Although in 1974 Ohio refused to allow the incorporation of a gay organization,<sup>114</sup> the issue of the permissibility of incorporation was resolved in favor of gay organizations in New York in 1973.<sup>115</sup> That same year, in New York, a gay legal defense fund was granted the status of a charitable organization.<sup>116</sup> After a long fight, the IRS in 1978 issued a revenue ruling making gay organizations eligible for tax-exempt status.<sup>117</sup> The availability of incorporation and tax-exempt status created *public* gay organizations and allowed gay money to support them.

In the public employment area, the number of cases declined in the 1970's. I believe this decline reflects the public employment victories won in the courts during the 1960's. The victories were cemented by an Office of Personnel Management policy statement issued during the Carter administration.<sup>118</sup> Interestingly, however, security clearance cases jumped from one in the 1960's to seven in the 1970's. The conquest of one front encouraged people to challenge another. Traditionally, gay employees had been denied security clearances because of their vulnerability to blackmail,<sup>119</sup> however, as gay men and women came out of the closet, the blackmail argument lost its validity. The "rational nexus" was gone. Again, gay persons sensed an opportunity for victory

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<sup>114</sup> *Grant v. Brown*, 39 Ohio St. 2d 112, 313 N.E.2d 847 (1974), *appeal dismissed*, 420 U.S. 916 (1975).

<sup>115</sup> *Gay Activists Alliance v. Lomenzo*, 31 N.Y.2d 965, 293 N.E.2d 255, 341 N.Y.S.2d 108 (1973).

<sup>116</sup> *In re Thom Lambda Legal Defense and Educ. Fund, Inc.*, 33 N.Y.2d 609, 301 N.E.2d 542, 347 N.Y.S. 571 (1973).

<sup>117</sup> Rev. Rul. 78-305, 1978-2 C.B. 172.

<sup>118</sup> U.S. Office of Personnel Management, Policy Statement on Discrimination on the Basis of Conduct Which Does Not Adversely Affect the Performance of Employees or Applicants for Employment (May 12, 1980). This policy was based on the Civil Service Reform Act of 1978, 5 U.S.C. § 2302(b)(10) (1982) (prohibiting discrimination against applicants or employees on the basis of conduct that does not adversely affect job performance).

<sup>119</sup> It has long been claimed that the unwillingness of homosexuals to reveal their sexual orientation and their fear of the consequences should their preference become known makes them particularly susceptible to blackmail. Of course, as more and more gay people refuse to hide their sexual lives from family, friends, and coworkers, the potential for blackmail will abate.

and seized it. The case results have been mixed. Informal newspaper reports, however, indicate that more and more gay persons are receiving security clearances without public outcry or litigation.<sup>120</sup> Perhaps, the government has quietly acquiesced.

Two other employment areas evince significant progress. Before 1970, no case had challenged a *private* employer's right to fire or refuse to hire a gay person. In the 1970's, there were eight such cases. All attempts so far to apply Title VII to sexual orientation have failed, and few victories have been gained in this area. D'Emilio, however, places great emphasis on "coming out" as a political act, labeling it "the key strategy for building a movement."<sup>121</sup> He argues that when gay people came out,

[t]hey relinquished their invisibility, made themselves vulnerable to attack, and acquired an investment in the success of the movement in a way that mere adherence to a political line could never accomplish. Visible lesbians and gay men also served as magnets that drew others to them. Furthermore, once out of the closet, they could not easily fade back in. Coming out provided gay liberation with an army of permanent enlistees.<sup>122</sup>

The California Supreme Court recognized the political significance of "coming out" and acted to protect "out" gay people under the California Labor Code, by defining "coming out" as a political act.<sup>123</sup> The decision remains a solitary one; if followed elsewhere, however, it will contribute to the solidification of the homosexual minority.

Another area of civil litigation in the 1970's deserves attention: cases involving gay teachers. Gay teacher cases were two in number in the 1960's, but jumped to ten in the 1970's. The 1970's, as D'Emilio notes, saw a backlash represented by the Anita Bryant "Save Our Children" movement. A prominent theme of the backlash was that homosexual persons should not be teachers. In the 1970's, ten reported cases chronicle teachers' fights to keep their jobs; most of the cases were tragic losses for the teachers. Perhaps the most infamous of these cases was *Gaylord v. Tacoma School District No. 10*,<sup>124</sup> which arose in the state of Washington. Gaylord lost his job because of his "status" as a

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<sup>120</sup> See, e.g., N.Y. Times, Dec. 30, 1980, at 6, col. 8.

<sup>121</sup> J. D'EMILIO, *supra* note 2, at 235.

<sup>122</sup> *Id.* at 236.

<sup>123</sup> *Gay Law Students Ass'n v. Pacific Tel. & Tel.*, 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979) (holding that policy of discrimination against "manifest homosexuals" infringed statute guaranteeing right to engage in political activity).

<sup>124</sup> 88 Wash. 2d 286, 559 P.2d 1340, *cert. denied*, 434 U.S. 879 (1977).

homosexual man. The cases in the teaching area reveal that while a homosexual political minority may be in the making, destructively homophobic social mores and myths remain strong in American life.

In examining the reaction of the courts to a new minority and its claims, a final development should be noted. Homosexual behavior was prohibited in all fifty states in the 1950's. In 1955, as D'Emilio emphasizes, the prestigious ALI advocated the adoption of the Model Penal Code, which decriminalized adult, consensual, private sexual acts.<sup>125</sup> In the 1960's, a period of liberal political activism, only two legislatures decriminalized homosexual behavior;<sup>126</sup> in the 1970's, however, twenty followed,<sup>127</sup> and (to date) one more has followed in the early 1980's.<sup>128</sup> Since 1980, courts in Massachusetts,<sup>129</sup> New York,<sup>130</sup> Pennsylvania,<sup>131</sup> and Texas<sup>132</sup> have held sodomy laws unconstitutional. Seemingly, as the legislatures have become more conservative, the courts have become more progressive. As of this writing, twenty-seven states have either legislatively or judicially decriminalized private, consensual homosexual

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<sup>125</sup> MODEL PENAL CODE § 213.2 (1962).

<sup>126</sup> See *supra* note 36.

<sup>127</sup> Act of July 17, 1978, ch. 166, 1978 Alaska Sess. Laws 219; Act of May 12, 1975, ch. 71, §§ 4-12, 1975 Cal. Stat. 131, 133-136; Colorado Criminal Code, chs. 40-3-403, 40-3-404, 1971 Colo. Sess. Laws 388, 423; Delaware Criminal Code, ch. 497, §§ 766, 767, 58 Del. Laws 1611, 1665-66 (1972); Hawaii Penal Code, Act 9, §§ 733-735, 1972 Hawaii Sess. Laws 32, 90-91; Act of Feb. 25, 1976, Pub. Law No. 148, ch. 4, § 2, 1976 Ind. Acts 718, 733-34; Iowa Criminal Code, ch. 1245, §§ 901-906, 1976 Iowa Acts 549, 558-59; Maine Criminal Code, ch. 499, §§ 251-255, 1975 Me. Laws 1273, 1297-1300; Nebraska Criminal Code, L.B. 38, §§ 32-38, 1977 Neb. Laws 88, 100-02; Act of July 2, 1973, ch. 532:26, 1973 N.H. Laws 999, 1011; New Jersey Code of Criminal Justice, ch. 95, §§ 14:1 to 14:3, 1978 N.J. Laws 482, 547-50; Act of Apr. 3, 1975, ch. 109, 1975 N.M. Laws 394, 394-99; Act of Mar. 19, 1977, ch. 122, 1977 N.D. Sess. Laws 265, 265-67; Act of Dec. 14, 1972, §§ 2907.01-.07, 1972 Ohio Laws 1866, 1906-11; Oregon Criminal Code of 1971, §§ 104-120, 1971 Or. Laws 1873, 1907-10; Crimes Code, No. 334, ch. 31, 1972 Pa. Laws 1482, 1528-31; Act of Feb. 26, 1976, ch. 158, §§ 22-2 to 22-4, 1976 S.D. Sess. Laws 227, 260-61; Washington Criminal Code, ch. 260, § 9A.88.100, 1975 Wash. Laws 817, 858; Act of Mar. 11, 1976, ch. 43, 1976 W. Va. Acts 241; Act of Feb. 24, 1977, ch. 70, 1977 Wyo. Sess. Laws 228, 228-310.

<sup>128</sup> WIS. STAT. ANN. § 944.17 (West 1982 & Supp. 1983).

<sup>129</sup> Commonwealth v. Sefranka, 80 Mass. Adv. Sh. 2487, 414 N.E.2d 602 (Mass. 1980) (supplied statutory definition limiting criminal sexual activity to solicitation and public sexual touching in the presence of persons who might be offended by the act).

<sup>130</sup> People v. Onofre, 51 N.Y.2d 476, 415 N.E.2d 936, 434 N.Y.S.2d 947 (1980), *cert. denied*, 451 U.S. 987 (1981) (statute imposing criminal sanctions for consensual sodomy between unmarried persons but not between married persons, violates right of privacy and equal protection).

<sup>131</sup> Commonwealth v. Bonadio, 490 Pa. 91, 415 A.2d 47 (1980) (voluntary deviate sexual intercourse statute violated equal protection and exceeded bounds of police power).

<sup>132</sup> Baker v. Wade, 553 F. Supp. 1121 (N.D. Tex. 1982) (statute proscribing deviate sexual intercourse between individuals of the same sex violated right of privacy and equal protection).

acts. For the first time, in more than one half of the states, homosexual persons are not criminals per se, and because the most populous states are among those which have decriminalized, more than fifty percent of America's citizens are now free from the burden of such statutes. Decriminalization is, as D'Emilio notes, important in removing stigma. It removes a rationale for discrimination in custody, immigration, and other civil matters.

My examination of civil litigation involving homosexuality reveals that the cases have rather closely tracked D'Emilio's historical account. The inevitable question, of course, is did the political and social events give rise to the litigation or was the litigation the harbinger of events to come? Of the two possible conclusions, the former seems to be the more likely. D'Emilio himself suggests that political and social changes gave gay persons the courage to enter the courts and seek justice. On the other hand, one case in an area has had the tendency to prompt other litigants to enter the field. For example, in the custody area, the gay pride that grew out of the Stonewall riot and the subsequent gay liberation movement seems to have encouraged gay parents to fight to keep their children. The much heralded *Schuster v. Schuster*<sup>133</sup> case, which the lesbian mothers won and which a film memorialized,<sup>134</sup> then gave the idea of litigation to many gay parents. Analogously, gay pride caused Sgt. Leonard Matlovich to take on the Secretary of the Air Force.<sup>135</sup> His well-publicized fight, in turn, gave hope and impetus to other gay persons in the military.<sup>136</sup> My conclusion is that social and political events were the precursors of litigation but that once litigation began in an area the process became mutually reinforcing.

The question that D'Emilio's book raises for me is whether gay political and legal gains have finally reached the stage where they cannot be reversed. One can see real setbacks for the civil rights of blacks and women under the Reagan Administration. It seems clear, however, that, while there have been setbacks, blacks and women can never again be reduced to the position they occupied in the 1940's and 1950's. Have gays now come that far also? Can the Reagan Administration and its "moral majority" allies put gay politics back in the closet? Twelve months ago I would have said no. Today I am not sure. The

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<sup>133</sup> No. D-36867 (Wash. Super. Ct. King County, Nov. 7, 1974), *aff'd in part*, 90 Wash. 2d 626, 585 P.2d 130 (1978).

<sup>134</sup> Entitled "Sandy and Madeleine's Family," the movie is available from IRIS Films, California.

<sup>135</sup> *Matlovich v. Secretary of the Air Force*, 414 F. Supp. 690 (D.D.C. 1976), *vacated*, 591 F.2d 852 (D.C. Cir. 1978).

<sup>136</sup> See, e.g., *benShalom v. Secretary of the Army*, 489 F. Supp. 964 (E.D. Wis. 1980).

specter of Acquired Immune Deficiency Syndrome (AIDS) is now being used to inflame irrational fear and prejudice. AIDS may be the lever the "religious" right has sought to scapegoat homosexual persons. If the gay community can survive AIDS, both literally and figuratively, gay civil rights will have entered the American mainstream to stay. John D'Emilio's book is an intelligent and interesting history of gay politics, a book worthy of study.

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